Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

92-721
No.

IN THE

Supreme Court of the United States

October Term, 1992

WILLIAM JOHN SEARS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RAYMOND E. KERNO
ELLIOT I. SUSSER
Counsel for Petitioner
LYSAGHT, LYSAGHT & KRAMER, P.C.
SARAH R. SPENO, *Of Counsel*
1983 Marcus Avenue, Suite C-100
Lake Success, NY 11042
(516) 358-1700

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(8794—LC7-436—1992)

Questions Presented For Review

1. Whether the instant application for a Writ of Certiorari should be granted, where the Judgments in the Courts below, if permitted to stand, would create a disharmony in the body of the law relating to perjury because, as Petitioner's underlying conviction for that crime lacked the necessary element of materiality, the Courts below incorrectly invaded the province of Congress in rewriting a federal penal statute.

Petitioner contends that this question should be answered in the affirmative.

2. Whether the instant application for a Writ of Certiorari should be granted and, on appeal to this Court, Petitioner's application for Habeas Corpus relief granted, because Petitioner's underlying conviction was obtained as a result of such inadequate legal representation as to constitute a denial of effective assistance of counsel.

Petitioner contends that this question should be answered in the affirmative.

3. Whether the instant application for a Writ of Certiorari should be granted, where the language of the perjury statute (18 U.S.C. Section 1623) is so ambiguous with respect to the undefined term "material" that due process considerations mandate this Court to grant Petitioner's application for Habeas Corpus, reverse the decisions of the Courts below, and dismiss the indictment of the Petitioner on the basis of the doctrine of lenity.

Petitioner contends that this question should be answered in the affirmative.

List of Interested Parties

GARY L. SHARPE
United States Attorney
Northern District of New York

GRANT C. JAQUITH
ANDREW T. BAXTER
Assistant U.S. Attorneys
P.O. Box 7198
100 South Clinton Street
Syracuse, New York 13261-7198

Table of Contents.

	Page
Question Presented for Review	i
List of Interested Parties	ii
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	3
Reasons For Granting Writ of Certiorari	9
Conclusion	18
Appendix A—Order of the United States Court of Appeals for the Second Circuit	19
Appendix B—Judgment and Memorandum Decision of the United States District Court for the Northern District of New York	23
Appendix C—Letter dated April 20, 1970, from William E. Foley, Acting Director of Administrative Office Of The United States Courts to Honorable John L. McClellan, Chairman, Subcommittee on Criminal Laws and Procedures, United States Senate	39

TABLE OF AUTHORITIES.

Page

CASES:

Brown v. United States, 245 F.2d 549, 552 (8th Cir. 1957)..... 12, 13

Crandon v. United States, ____ U.S. ____, 110 S.Ct. 997 (1990)..... 17

Dunn v. United States, 442 U.S. 100 (1979)..... 16

Liparota v. United States, 471 U.S. 419 (1985) 17

Masinia v. United States, 296 F.2d 871 (8th Cir. 1961).. 11, 13

Rewis v. United States, 401 U.S. 808 (1971) 15

Sears v. U.S., 791 F. Supp. 950 (N.D.N.Y. 1992) 2

U.S. v. Allen, 892 F.2d 66 (10th Cir. 1989) 10

United States v. Bass, 404 U.S. 336 (1971) 17

U.S. v. Cook, 922 F.2d 1026 (2d Cir. 1991)..... 4

U.S. v. Farnham, 891 F.2d 331 (4th Cir. 1986) 11

U.S. v. Gremillion, 464 F.2d 901 (5th Cir. 1972), *cert. den.* 409 U.S. 1085 (1972) 10

United States v. Guariglia, 962 F.2d 160 (2d Cir. 1992) 11

United States v. Jacobs, 543 F.2d 18 (7th Cir. 1976).. 12

U.S. v. Koonce, 485 F.2d 374 (8th Cir. 1973) 13

U.S. v. Martinez, 855 F.2d 621 (9th Cir. 1988) 10

United States v. Thompson/Center Arms Company, ____ U.S. ____, 112 S.Ct. 2102 (1992)..... 18

STATUTES:

15 U.S.C. Section 1175 4

15 U.S.C. Section 1176 4

18 U.S.C. Section 1623..... 3, 5, 7, 8, 10, 11, 15, 16

28 U.S.C. Section 1254 (1)..... 2

28 U.S.C. Section 1746 3

28 U.S.C. Section 2255 2

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

WILLIAM JOHN SEARS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner William John Sears, prays for a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit entered in these proceedings on or about July 15, 1992 which affirmed an Order of the United States District Court for the Northern District of New York dated April 16, 1992 as amended April 20, 1992,

which denied his Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. Section 2255, alleging that his conviction under the perjury statute (18 U.S.C. Section 1623) had no basis because of the failure by the government to establish the necessary element of materiality, and that the failure of his then counsel to raise this issue in any way constituted denial of effective assistance of counsel in violation of his rights under the Sixth Amendment of the United States Constitution, and on the basis of the doctrine of lenity.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit affirming the Order of the United States District Court for the Northern District of New York appears at page 23-26 of the attached Appendix. The decision has not as yet been officially reported.

The Judgment and written Decision of the United States District Court for the Northern District of New York which denied Petitioner's Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. Section 2255, appears at page 27 of the attached Appendix. The decision has been officially reported at 791 F. Supp. 950 (N.D.N.Y. 1992).

JURISDICTION

The final Order of the Court of Appeals was entered on July 15, 1992. This Court has jurisdiction to review the Judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18 of the United States Code Chapter 79-Perjury, 18 U.S.C. Section 1623 (a):

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On July 20, 1989, Petitioner was arrested on a charge of violating Title 15 U.S.C. Sections 1175 and 1176 (Use and Possession of Gambling Devices Within Indian Territory). Eight days later, Petitioner was indicted on that charge under Docket No. 89-CR-148.

When Petitioner was arrested on charges of violating Title 15 U.S.C. Sections 1175 and 1176 (Use and Possession of Gambling Devices Within Indian Territory) and subsequently indicated on those charges under Northern District Docket No. 89-CR-148, he was only one of a number of other Native Americans of the Mohawk Nation who were also indicted for similar violations. Apparently, all of the arrests were made pursuant to a previous plans to eliminate illegal gambling from the St. Regis Indian Reservation, a six square mile tract of land located around a village of the same name.

With the exception of Petitioner, all of the arrested and indicted Mohawk Indians entered pleas of guilty to the charges against them with an understanding that the jurisdiction of the Court and the legality of the charges against them would be determined on appeal to the Court of Appeals for the Second Circuit. That Court, in *United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991), upheld the convictions as being lawful.

On November 17, 1989, the case was moved to trial by the Government and a trial jury was impaneled, with Senior Judge ELLSWORTH A. VAN GRAAFEILAND presiding. At the trial, Petitioner contended that he was innocent and

that the seized gambling devices did not belong to him. In addition to his own testimony, Petitioner presented a witness named Jerome Cook, who swore under oath that the gambling devices in question belonged to him, and that Petitioner was blameless. Three days later, the jury returned a verdict of not guilty following 40 minutes of deliberation.

The jury acquitted Petitioner of all charges. However, during his direct testimony, in response to a question presented to him by his then attorney, Petitioner made a statement as to his previous military record, which was not correct. Petitioner stated that he was a Viet Nam War veteran and that he was the recipient of numerous decorations. He also stated that he had been the subject of a Court-Martial while in the military. In actual fact, while it was true that Petitioner had been the subject of a Court-Martial while in the military, he had not been sent to Viet Nam and he had not been awarded any decorations.

Subsequent to the acquittal, the Office of the United States Attorney conducted an investigation and ascertained Petitioner's actual military record. As a result, Petitioner was indicted under Docket No. 91-CR-227 for violating Title 18 U.S.C. Section 1623 (Perjury), and subsequently arraigned. At the arraignment, Petitioner pleaded not guilty.

On September 30, 1991, pursuant to a plea agreement arranged between the Government and Petitioner's then counsel, Petitioner pleaded guilty before Chief Judge NEAL P. MCCURN to the indictment. On November 27, 1991, Chief Judge MCCURN sentenced Petitioner to a term of incarceration of eight months and a fine of $10,000.00.

Petitioner's then counsel negotiated said plea agreement without having previously made any motion to dismiss the indictment. Apparently, he did not deem it to be of significance that the false statements by Petitioner might not have been material to the charge of Perjury.

Petitioner's then counsel did not recognize that Petitioner's statements concerning his military career were immaterial to the issue to be resolved by the trial jury, which was considering the charges against him involving the gambling devices. Specifically, Counsel had overlooked the fact that, at the trial, Petitioner had adduced independent evidence of his innocence to the charge of possession and use of gambling devices. This evidence was in the form of testimony by a third person, Jerome Cook, who made inculpatory statements with respect to the charges for which Petitioner stood trial.

Therefore, the issue to be resolved by the trial jury with respect to Petitioner's guilt or innocence involved more than a mere evaluation of Petitioner's credibility as a witness. Had this been the case, the issue of credibility would have been material to the question of Petitioner's guilt or innocence. As Petitioner presented evidence independent of his own testimony to the trial jury, his testimony as to his prior military record became immaterial to this question.

Rather than raise this point to the Court on a motion to dismiss the indictment, Petitioner's then counsel advised Petitioner not to contest the charge against him, enter a plea of guilty, and make an affirmative admission that his statements were material to the conviction. In doing so, Petitioner's then counsel caused Petitioner to give up his only

defense to the charges, and this was a defense which was complete.

After Petitioner was sentenced to serve eight months incarceration, he commenced service of his sentence on or about January 7, 1992, believing that he had no defense to the indictment. It was not until Petitioner had served two months of his eight month sentence that family disruptions and personal concerns caused him to seek new counsel. He eventually retained new counsel to look into the possibility that he had been unjustly convicted as a result of ineffective assistance of counsel. With new counsel, he made a Petition for a Writ of Habeas Corpus.

The Writ of Habeas Corpus was based on two related grounds: (1) failure of the Government to establish that the false statement by Petitioner was material to the issue presented at the trial held with respect to 89-CR-148, as required by Title 18 U.S.C. Section 1623 (a); and (2) ineffective assistance of counsel, in that Petitioner was never apprised of the defense of materiality to the perjury charge by his then attorney.

The application was made on or about April 6, 1992 and made returnable before Senior Judge HOWARD G. MUNSON, as Chief Judge MCCURN was not available to decide the matter, and Petitioner desired an early decision. By Judgment dated April 20, 1992, Petitioner's application for Writ of Habeas Corpus was denied with prejudice.

The opinion in the District Court denying Petitioner's application for a Writ of Habeas Corpus stated that it did not accept Petitioner's argument with respect to the lack of materiality of the false statements. The District Court stated

that, as it was of the opinion that the false statements were material to the perjury, former counsel's representation of Petitioner was not ineffective.

Petitioner respectfully disagreed with this analysis, and, accordingly, filed a timely appeal in the Court of Appeals for the Second Circuit. On July 15, 1992, a decision of the Court of Appeals for the Second Circuit was filed, affirming the decision in the Court below. The Second Circuit agreed with Petitioner that the merits of his case stand or fall on the materiality issue. However, the Second Circuit disagreed with Petitioner on the issue, stating, "defendant admits that the false statements made by him were designed to bolster his credibility. He therefore cannot deny the materiality of these statements."

With due respect to the Second Circuit, Petitioner suggests that the Court's summary conclusion, equating the credibility of a criminal defendant with materiality for purposes of perjury, is incorrect. It is Petitioner's contention that by so doing, the Second Circuit, as well as the Northern District of New York, have effectively deleted the materiality requirement from the definition of perjury contained in 18 U.S.C. Section 1623. If one follows the reasoning of the Courts below, there is nothing that a defendant-witness could state while testifying which would not be material. Under such a view, any false statement, material or immaterial to the issues to be decided, could be said to bear upon a defendant's credibility. Such a view necessarily rewrites 18 U.S.C. Section 1623, and is a clear invasion of the legislative prerogative of Congress.

Petitioner now moves this Court for a Writ of Certiorari to further review this controversy.

REASONS FOR GRANTING WRIT OF CERTIORARI

I

THE INSTANT APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED, WHERE THE JUDGMENTS IN THE COURTS BELOW, IF PERMITTED TO STAND, WOULD CREATE A DISHARMONY IN THE BODY OF THE LAW RELATING TO PERJURY BECAUSE, AS PETITIONER'S UNDERLYING CONVICTION FOR THAT CRIME LACKED THE NECESSARY ELEMENT OF MATERIALITY, THE COURTS BELOW INCORRECTLY INVADED THE PROVINCE OF CONGRESS IN REWRITING A FEDERAL PENAL STATUTE.

The instant application for a Writ of Certiorari should be granted, because, if permitted to stand, the decision of the Second Circuit in this case would create a disharmony in the body of the law relating to perjury. This is because, given that Petitioner's underlying conviction for that crime lacked the necessary element of materiality, the Courts below have unwarrantedly invaded the province of Congress and have rewritten a federal penal statute to eliminate the element of materiality.

With all due respect to the Courts below, the Judgment which is the subject of the instant Writ from should be reversed because Petitioner's guilt was not established on the basis of the Record presented. Accordingly, Petitioner's application for Habeas Corpus relief should have been granted, while this matter was pending in the Northern Dis-

trict of New York. Specifically, the necessary element of materiality was not established within the particular fact pattern of this case. See *U.S. v. Martinez*, 855 F.2d 621 (9th Cir. 1988).

It is Petitioner's contention that the issues to be resolved at his trial for Use and Possession of Gambling Devices on Indian Territory involved much more than an assessment of Petitioner's credibility. Petitioner presented independent evidence tending to establish his innocence for the consideration of the trial jury, quite apart from and in addition to his testimony. Compare *U.S. v. Gremillion*, 464 F.2d 901 (5th Cir. 1972), *cert. den.* 409 U.S. 1085 (1972).

It is for this reason that Petitioner submits that the credibility of his testimony at the hearing was not material to the question of his guilt or innocence of the charge, given his presentation of exculpatory evidence which was independent of his testimony. *U.S. v. Allen*, 892 F.2d 66 (10th Cir. 1989).

This Court has never made a ruling with respect to the meaning of the undefined term "false material declaration" which is one of the elements of the crime of perjury as stated in 18 U.S.C. Section 1623. The Decision in the Second Circuit has equated the credibility of a defendant-witness with materiality. In so doing, it is respectfully submitted that the Second Circuit has eliminated the element of materiality from the definition of the crime of perjury. This is so because any conceivable statement made by a defendant-witness while testifying can be said to bear upon credibility.

The Decision of the Second Circuit states that:

> The test for materiality "is whether the false testimony was capable of influencing the fact finder in deciding the issues before [it]." [Citation omitted.] Statements affecting a witness's credibility are capable of influencing a jury on the issues before it, and therefore are material and violate 18 U.S.C. Section 1623. *See United States v. Guariglia,* Docket No. 91-1372, slip op. at 3115 (2d Cir. April 17, 1992). [Now officially reported at 962 F.2d 160 (2d Cir. 1992).]

In so holding, the Second Circuit is out of harmony with several Circuits. See, in this regard, *Masinia v. United States*, 296 F.2d 871 (8th Cir. 1961), in which the Court held:

> To be violative of this statute, the false testimony or perjury must relate to a material matter which was within the jurisdiction of the grand jury to investigate and have the tendency to influence, hamper or mislead its investigation thereof.

The Second Circuit's Opinion, cited above, has effectively eliminated the first element of the crime of perjury as stated in the Opinion of the 8th Circuit in *Masinia*. This Court's intervention is clearly required to correct the obvious disharmony.

In *U.S. Farnham*, 891 F.2d 331 (4th Cir. 1986), the Court stated with respect to the perjury statute:

> While the government must establish a nexus between the investigation and the false declaration, it need not prove the connection beyond a reasonable doubt.

The Second Circuit's Opinion, cited above, would indicate that no such nexus need be established by the government as one of the elements of the crime of perjury. Again, this Court's intervention is clearly required to correct the obvious disharmony.

The Opinion of the Seventh Circuit on this issue, as stated in *United States v. Jacobs*, 543 F.2d 18 (7th Cir. 1976), was that:

> False declarations made before a grand jury material only to an investigation beyond its jurisdiction or authority do not constitute perjury. *Brown v. United States*, 245 F.2d 549, 552 (8th Cir. 1957).

One could hardly postulate a set of facts closer to those presented by the case at Bar, absent a case with identical facts. The Seventh Circuit has held that false statements, which undeniably affected the witness' credibility, do not constitute perjury where the subject matter was material "only to an investigation beyond its jurisdiction or authority." Yet again, this Court's intervention is clearly required to correct the obvious disharmony.

The Court, in *Jacobs*, cites to the Eighth Circuit Opinion in *Brown v. United States*, 245 F.2d 549, 552 (8th Cir. 1957). This is yet again a clear case in which the Eighth Circuit's Opinion cannot be harmonized with the Decision in the Second Circuit in the case at Bar. In *Brown*, the Court stated:

> The record makes it clear that the counts in question have to do with answers given by defendant while under oath before a grand jury called, sworn and sitting in the district of Nebraska and that the offenses charged in these counts have to do with matters which occurred in the Eastern-District of Missouri. If the grand jury of Nebraska was without authority to inquire into offenses committed in Missouri, then the answers of defendant, even if false, would not amount to perjury.

One could hardly suggest that the testimony of the defendant in *Brown* would not have affected his credibility. According to the Second Circuit, this false testimony would be sufficient to constitute perjury. The Eighth Circuit considered that the false testimony did not amount to perjury because the subject matter was something into which the Grand Jury did not possess authority to inquire.

The Eighth Circuit has been quite consistent in its holdings on this issue. In *U.S. v. Koonce*, 485 F.2d 374 (8th Cir. 1973), The court reaffirmed its Decision in *Masinia, supra,* and held:

> It is established that a perjury conviction may not be based upon testimony not material to any proper inquiry of a grand jury.

Once again, the Opinion in the Second Circuit in the case at Bar is not in harmony with the holdings of the Eighth Circuit. The formulations of the Eighth Circuit in *Brown* and in *Koonce* clearly indicate that a matter not material to the issues before the relevant tribunal cannot form the basis of a perjury conviction, even where testimony concerning that

matter is false. The intervention of this Court is clearly necessary to remove this clear disharmony from the body of federal law.

II

THE INSTANT APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND, ON APPEAL TO THIS COURT, PETITIONER'S APPLICATION FOR HABEAS CORPUS RELIEF GRANTED, BECAUSE PETITIONER'S UNDERLYING CONVICTION WAS OBTAINED AS A RESULT OF SUCH INADEQUATE LEGAL REPRESENTATION AS TO CONSTITUTE A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that his conviction for Perjury cannot be permitted to stand because he received such inadequate legal representation at the trial level, as to constitute a denial of effective assistance of counsel. A gross failure in the requirement for such effective assistance of counsel occurred when Petitioner's previous counsel failed to instruct him of the existence of a defense to the crime with which he was charged.

When Petitioner was charged with perjury, his then attorney failed to advise Petitioner of the defense available to him. Indeed, Petitioner's then counsel appears not to have understood that materiality is a necessary element to any perjury conviction, the absence of which is necessarily fatal to any count in an indictment charging perjury. Said attorney failed to test the validity of the perjury charge by making a motion to dismiss the indictment on this basis.

This failure resulted in a miscarriage of justice which this Court ought remedy by granting the instant application.

III

THE INSTANT APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED, WHERE THE LANGUAGE OF THE PERJURY STATUTE (18 U.S.C. SECTION 1623) IS SO AMBIGUOUS WITH RESPECT TO THE UNDEFINED TERM "MATERIAL" THAT DUE PROCESS CONSIDERATIONS MANDATE THIS COURT TO GRANT PETITIONER'S APPLICATION FOR HABEAS CORPUS, REVERSE THE DECISIONS OF THE COURTS BELOW, AND DISMISS THE INDICTMENT OF THE PETITIONER ON THE BASIS OF THE DOCTRINE OF LENITY.

This Court has long recognized that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808 (1971). It is respectfully submitted that the failure to define the term "false material declaration" is a serious flaw in the wording of 18 U.S.C. Section 1623. It was suggested as long ago as April 20, 1970 by then Acting Director of the Administrative Office of the United States Courts, William E. Foley, that the statute would have greater clarity if the words "false statements of material fact" were employed. See Appendix C at page 43, hereto which consists of a letter written by Mr. Foley to Senator John L. McClellan as Chairman of the Subcommittee on Criminal Laws and Procedures of the United States Senate with respect to the Organized Crime Control Act of 1969.

Regrettably, the clarification recommended by Director Foley has never been adopted by the Congress. This has created a situation in which considerable doubt exists as to what precisely is prohibited by 18 U.S.C. Section 1623. It is respectfully submitted that under these circumstances this Court should grant the instant Petition to enable it to exercise the doctrine of lenity on behalf of the Petitioner.

In *Dunn v. United States*, 442 U.S. 100 (1979), this Court invoked the doctrine of lenity in a perjury case. This Court held, at page 112:

> This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. [Citations omitted.]

It is respectfully submitted that the situation presented by the facts in the case at Bar, in which false testimony concerning Petitioner's military service, some 20 years prior to the date of the crime for which he was ini ly charged, was held by the Courts below to constitute erjury, is not "plainly and unmistakably" proscribed by 18 U.S.C. Section 1623. Under these circumstances, it is further submitted that this is an appropriate case for this Court to invoke the doctrine of lenity on Petitioner's behalf.

This Court has regularly and consistently held that it is appropriate to employ the doctrine of lenity where the statute is so inadequately written as to fail to put citizens on reasonable notice of what is proscribed. See, in this regard, *Liparota v. United States*, 471 U.S. 419 (1985):

> Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. See *United States v. Bass, supra*, 404 U.S., at 348, 92 S.Ct., at 523 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity").

See also, in this regard, *Crandon v. United States*, ____ U.S. ____, 110 S.Ct. 997 (1990):

> Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of Section 209 is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

The doctrine of lenity was most recently employed by this Court in *United States v. Thompson/Center Arms Company*, ____ U.S. ____, 112 S.Ct. 2102 (1992). It is respectfully submitted that the issue presented by the case at bar, in which an individual will be stigmatized by a federal felony conviction for the rest of his life, is at least as worthy of the application of the rule of lenity by this Court as the situation presented in *Thompson/Center*. There, the issue was one of a corporate defendant who was faced with a criminal violation of a tax law. The stigmatization of an individual by a felony conviction for a crime for which the statutory basis is ambiguous should not be allowed to stand by this Court.

CONCLUSION

For the reasons stated above, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

RAYMOND E. KERNO
ELLIOT I. SUSSER
Counsel for Petitioners
LYSAGHT, LYSAGHT & KRAMER,
SARAH R. SPENO, Of Counsel
1983 Marcus Avenue, Suite C-100
Lake Success, NY 11042-1016
(516) 358-1700

APPENDIX A—Decision and Order of United States Court of Appeals for the Second Circuit, Dated July 15, 1992.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York on the fifteenth day of July, one thousand nine hundred and ninety-two.

Present:

Hon. Frank X. Altimari,
Hon. J. Daniel Mahoney,
Hon. John M. Walker, Jr.,
Circuit Judges.

WILLIAM JOHN SEARS,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

92-2250

William John Sears appeals from a judgment of the United States District Court for the Northern District of

New York (Munson, *S.J.*), dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2255.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court is AFFIRMED.

On April 8, 1992 Sears filed a petition for writ of habeas corpus alleging that he had been denied effective assistance of counsel. According to Sears, a reasonably competent attorney would-have recognized that the indictment charging him with perjury was facially defective in that it inadequately failed to allege the materiality of his false statements. Sears maintains that a reasonably competent attorney would have moved successfully for the indictment's dismissal.

Sears was arrested and tried in 1989 for using and/or possessing illegal gambling devices in violation of 15 U.S.C. § 1175 (1988). After a three-day trial, a jury acquitted Sears of these charges. However, during his direct examination at trial, Sears testified that in the course of his military service he had seen duty in Vietnam and had been awarded a number of decorations, including a purple heart and two bronze stars. Sears admitted that he so testified in order to bolster his credibility with the jury. In actuality, Sears had been a switchboard operator assigned to Fort Gordon, Georgia and Fort Bragg, North Carolina, and had been court martialed on two occasions, based on seven offenses committed during his enlistment.

On July 31, 1991, Sears was indicted for having uttered a false declaration before a United States court in violation of 18 U.S.C. § 1623(a). On advice of counsel, Sears pled guilty to the one-count indictment. Sears was subsequently sentenced to an eight month prison term.

On appeal, Sears contends that the credibility of his testimony at trial was not material because he presented excul-

patory evidence that was independent of his testimony. Specifically, a witness called by Sears to testify invoked his right to refuse to answer under the Fifth Amendment when asked whether he owned the slot machines seized. According to Sears, his counsel's failure to recognize that the indictment was defective, because of this witness's testimony, resulted in a violation of Sears' Sixth Amendment right to counsel.

In order to prevail on his claim, Sears must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing this argument, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Because Sears claims that his counsel's failure to litigate the materiality issue violated his Sixth Amendment right to counsel, Sears must first demonstrate that his false testimony was not material to the issue before the court. We find that Sears' materiality argument is without merit. Therefore, Sears cannot rely upon his counsel's failure to litigate materiality as a basis for establishing ineffective assistance of counsel.

The test for materiality "is whether the false testimony was capable of influencing the fact finder in deciding the issues before [it]." *United States v. Fayer*, 573 F.2d 741, 745 (2d Cir.), *cert. denied*, 439 U.S. 831 (1978). Statements affecting a witness's credibility are capable of influencing a jury on the issues before it, and therefore are material and violate 18 U.S.C. § 1623. *See United States v. Guariglia*, Docket No. 91-1372, slip op. at 3115 (2d Cir. April 17, 1992). Here the defendant admits that the false statements made by him were designed to bolster his credibility. He

therefore cannot deny the materiality of these statements. The fact that Sears presented exculpatory evidence that was independent of his testimony is of no moment, because the jury may still have been influenced by Sears' testimony. Accordingly, the order of the district court is affirmed.

HON. FRANK X. ALTIMARI,
HON. J. DANIEL MAHONEY,
JOHN M. WALKER, JR.,
Circuit Judges.

Filed
Jul 15, 1992
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

APPENDIX B—Memorandum-Decision and Order of Hon. Howard G. Munson, U.S.D.J., N.D.N.Y., Dated April 16, 1992.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

WILLIAM J. SEARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

92-CV-448

Appearances:

Lysaght, Lysaght & Kramer, 1983 Marcus Avenue, Lake Success, NY 11042-1016, Of Counsel: Elliot I. Susser, Joseph L. Decolator.

Gary L. Sharpe, United States Attorney, Northern District of New York, P.O. Box 7198, 900 Federal Building, Syracuse, NY 13261-7198, Of Counsel: Andrew T. Baxter, Grant C. Jaquith.

HOWARD G. MUNSON, S.J.

Before the court is a petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2255 (1988). Petitioner William J. Sears is currently incarcerated in Hollidaysburg, Pennsylvania, having served approximately two months of his eight month sentence after pleading guilty in this district to violating 18 U.S.C. § 1623 (1988) ("False declarations before grand jury or court"). Sears's petition is based upon his belief that he was convicted without effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution. Sears is represented by new counsel in the instant proceeding.[1]

I. BACKGROUND

In the early morning hours of December 16, 1987, New York State Troopers executed a search warrant at Wild Bill's Grocery & Deli ("Wild Bill's") on the St. Regis Mohawk Indian Reservation, which is located in this district near Massena, New York. At the time, petitioner Sears allegedly owned Wild Bill's. Pursuant to the warrant, the

[1]Pursuant to Local Rule 12, the court clerk assigned Sears's petition to Chief Judge McCurn, as Judge McCurn was the judge who presided over the underlying criminal case that resulted in Sears's present incarceration. On April 3, 1992, five days before actually filing this petition, Sears's current attorney contacted Judge McCurn's chambers and asked that the petition be considered on an expedited basis. After learning that Judge McCurn would be unable to accommodate his request, Sears's attorney requested that the case be temporarily assigned to another district judge who at least could grant preliminary relief.

In accordance with counsel's request, Judge McCurn reassigned the case to this court. After receiving Sears's petition, this court notified the United States Attorney for the Northern District of New York of the pendency of this matter, and requested that response papers be filed expeditiously. The United States Attorney has filed response papers in a timely fashion.

troopers searched for and found thirty gambling devices in a back room of Wild Bill's. The troopers seized the machines and left the premises. More than two and a half years later, on July 20, 1989, state troopers arrested Sears for using and/or possessing illegal gambling devices in violation of 15 U.S.C. § 1175 (1988). Eight days later, a federal grand jury impaneled in this district indicted Sears on the same charge.

Jury trial on Sears's indictment began in this district on November 17, 1989, before Circuit Judge Van Graafeiland (sitting by designation). During Sears's case-in-chief, his defense counsel called him to the stand and the following dialogue ensued:

> Q (by defense counsel):
> Sir, I want to talk to you briefly about your personal. Do you have any military experience?
> A (by Sears):
> Yes. I was in the United States Army for six years.
>
> * * *
>
> Q: Did you serve any or did you have any overseas assignments?
> A: Yes.
> Q: Would you tell us where?
> A: Southeast Asia, Vietnam.
>
> * * *
>
> Q: During the course of the period of your military service, did you receive any declarations?
> A: Yes, I did.
> Q: Would you tell us what they were?

A: I received a combat infantry badge, two Vietnamese campaign ribbons, purple heart, two bronze stars and I refused a silver star.

* * *

Q: When was the first time you were wounded, sir?

A: I was 19 years old. I can't remember the exact date. It was 1969.

Q: Were you wounded a second time?

A: In 1970. I didn't—the first one I didn't apply, the paperwork was never processed for the first one. The second one was processed.

Transcript (11/17/89), *United States v. Sears*, 89-CR-148, at 110-11. Sears subsequently denied that he ever possessed or controlled the illegal gambling devices in question. *Id.* at 132. After a three-day trial, the jury acquitted Sears of the illegal use and/or possession charge.

Sears's tribulations with the government did not end with his 1989 acquittal, however. This is because through his testimony concerning his military record, Sears weaved himself into a tangled web from which he could not escape. More particularly, the government thereafter learned that Sears's testimony concerning his military record, specifically with respect to his honors and injuries, was false. Sears has since admitted that he knowingly fabricated this testimony. *E.g.* Plea Agreement (9/20/91), *United States v. Sears*, No. 91-CR-227, at ¶ 2 (Sears "admits that he knew this testimony concerning his military service and awards were false . . ."). In fact, according to the government, Sears never set foot in Vietnam but, instead, "earn[ed] the dubious distinction of being court martialed on two occa-

sions, based on seven offenses committed during his enlistment." Gov. Mem. (4/14/92) at 3 n.1.

On July 31, 1991, another grand jury indicted Sears for having uttered a false declaration before a United States court in violation of 16 U.S.C. § 1623(a). Sears pled guilty to the one-count indictment on September 30, 1991. On November 27, 1991, Judge McCurn sentenced Sears to his present eight month prison term.

II. DISCUSSION

A. Standard for reviewing claim of ineffective assistance of counsel

As previewed above, the basis for Sears's petition is his belief that he was deprived of his Sixth Amendment right to effective assistance of counsel and that this unconstitutional deprivation resulted in his present incarceration. The court notes at the outset that Sears must satisfy a stringent burden in order to prevail on this "ineffective assistance" argument. The burden is demanding in that Sears cannot prevail merely by showing that his counsel employed poor strategy or even that his counsel made a wrong decision. In order to prevail on his claim, Sears must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 & 689 (1984); *accord, Anwar v. United States*, 648 F. Supp. 820, 826 (N.D.N.Y. 1986) (Munson, C.J.), *aff'd mem.*, 823 F.2d 544 (2d Cir. 1987); *Goodrich v. Smith*, 643 F. Supp. 579, 581 (N.D.N.Y. 1986) (McCurn, J.). Moreover, in reviewing Sears's argument, the court must proceed with a "strong presumption" that his defense counsel's conduct fell within

the broad spectrum of reasonableness. *E.g. Strickland*, 466 U.S. at 689.

Sears argues that he was deprived of effective assistance of counsel because a reasonably competent attorney would have recognized that the indictment charging him with perjury was facially defective. According to Sears, the indictment was defective because lacked an indispensable element of perjury, *to wit* materiality. *See* 18 U.S.C. § 1623(a). While Sears concedes that much of his November, 1989 testimony concerning his military record was false *see supra*, he relies in part upon *United States v. Allen*, 892 F.2d 66 (10th Cir. 1989), to demonstrate that his false testimony was not material to the issue before the court. In this regard, he argues that because the indictment failed to adequately allege materiality, it was facially defective and a reasonably competent attorney would have moved successfully for its dismissal.

Since he relies upon his counsel's failure to litigate the materiality issue as the basis of his Sixth Amendment argument, Sears must preliminarily convince the court that his materiality argument is meritorious. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (counsel's failure to request suppression hearing); *United States v. Matos*, 905 F.2d 30, 32 (2d Cir. 1990) (same). In other words, to establish that his counsel was truly ineffective, Sears must show a "reasonable probability" that the outcome of the underlying case would have been different but for his counsel's failure to pursue the materiality argument. *See Kimmelman*, 477 U.S. at 375; *Matos*, 905 F.2d at 32. For the reasons discussed below, this court finds that Sears's materiality argument is without merit. Therefore, Sears cannot rely upon his counsel's failure to litigate materiality as a basis for establishing ineffective assistance of counsel.

B. The merits of Sears's materiality argument

It is axiomatic that § 1623(a) governs only those situations in which a speaker, while under oath, "knowingly makes any false *material* declaration" to a United States court or grand jury. 18 U.S.C. § 1623(a) (emphasis added); *see, e.g., United States v. Novod*, 927 F.2d 726, 729 (2d Cir.), *cert. denied*, 111 S. Ct. 2018 (1991) (grand jury context); *United States v. Berardi*, 629 F.2d 723, 727-28 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980) (same). Thus, a misrepresentation which is not material cannot form the basis for a perjury conviction. *E.g. Allen*, 892 F.2d at 67. The parties agree that "[t]he test for materiality is whether the false statement has a natural tendency to influence or was capable of influencing the decision required to be made." *Allen*, 892 F.2d at 67 (citing *United States v. Gardner*, 773 F.2d 257, 259 (10th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986)). The issue of whether a statement is "material" presents a question of law which the court must decide. *E.g. United States v. Moon*, 718 F.2d 1210, 1237 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) (citation omitted).

Contrary to Sears's contention, testimony in a trial need *not* bear directly on the elements of the offense charged in the indictment in order to be considered material. It is well settled that statements concerning collateral matters may be material as well. *E.g. United States v. Kiszewski*, 877 F.2d 210, 218 (2d Cir. 1989) (citing *Berardi*, 629 F. 2d at 728).[2] In fact, every Court of Appeals which has reviewed the

[2]Sears complains that cases such as *Kiszewski* are distinguishable because the misrepresentations in those cases were uttered before a grand jury, not a court. Pet. Reply Mem. (4/15/92) at 3. The lack of merit in Sears's distinction is readily apparent from the text of § 1623(a), which proscribes misrepresentations to a United States court *or* grand jury. In other words, the statement is equally perjurious if uttered before either tribunal. Thus, Sears's distinction is inconsequential.

issue has ruled that a witness's credibility is material to the fact-finder's consideration of a case. *See United States v. Sablosky*, 810 F.2d 167, 169 (8th Cir.), *cert. denied*, 484 U.S. 833 (1987); *United States v. Scivola*, 766 F.2d 37, 44 (1st Cir. 1985); *see also United States v. Salinas*, 923 F.2d 339, 341 (5th Cir. 1991); *United States v. Anderson*, 798 F. 2d 919, 926 (7th Cir. 1986).[3] The rationale behind this rule seems logical enough: because jurors weighing the evidence are instructed to consider each witness's credibility, statements which bolster or diminish credibility might affect the outcome of a case. The fact that credibility might affect the outcome of a case means that credibility is material. *See, e.g. Scivola*, 766 F.2d at 44 (citing *United States v. Giarratano*, 622 F.2d 153, 156 (5th Cir. 1980); *United States v. Allen*, 409 F. Supp. 562, 565 (E.D. Va. 1975), *aff'd mem.*, 541 F.2d *Allen*, 409 F. Supp. 562, 565 (E.D. Va. 1975), *aff'd mem.*, 541 F.2d 278 (4th Cir. 1976)). This chain of logic comports with the Second Circuit's instruction that "[m]ateriality is demonstrated if the question posed is such that a truthful response could potentially aid the inquiry or a false answer hinder it." *Moon*, 718 F.2d at 1237.[4]

---

[3]Sears's attempts to distinguish these cases from the case at bar are unavailing. Sears generally distinguishes the cases based upon the narrow factual scenario presented in each. Under Sears's analysis, the court could not rely upon a decision for authority unless the case is factually identical to the present.

The fact of the matter is that the authority cited by the government is much more analogous to the present case than that cited by Sears. At any rate, the court relies upon these decisions for their legal conclusions, which (for the reasons discussed herein) are directly applicable to the case at bar.

[4]The government insightfully points to *dicta* in the Supreme Court's decision in *United States v. Havens*, 446 U.S. 620 (1980), as enlightening as well. In *Havens*, the Court noted that a criminal defendant who knowingly lies in response to impeachment questions on cross-examination "would unquestionably be subject to a perjury prosecution." 446 U.S. at 627 (citations omitted). Since impeachment questions are by definition directed at a witness's credibility, the court's statement in this respect gives further support to the notion that misrepresentations which affect credibility are material and thus perjurious.

Turning to the present case, it is clear that the misrepresentations that Sears uttered at his 1989 trial could have enhanced his credibility in the eyes of the jury. By testifying that he had received a combat infantry badge, two Vietnamese campaign ribbons, a purple heart, and two bronze stars, had refused a silver star, and had been wounded while fighting on behalf of citizens such as the jurors, Sears painted a self-portrait of valor and courage which surely could have enhanced his image in the minds of the jurors. When the jury listened to his subsequent testimony, in which he disavowed possession and/or use of the gambling devices in question, the jury certainly could have considered his earlier testimony concerning his exemplary military record in deciding how much weight to afford his version of the facts. To be sure, one is left to wonder why Sears would have offered his military fantasy in the first place if he had not believed that it would bolster his credibility in the eyes of the jury.[5]

The fact that Sears's testimony *could* have strengthened his credibility with the jury is enough to show that the testimony was material. This is because the government need not establish that Sears's testimony *actually* affected the jury. A statement's mere capacity to influence the trier of fact is enough to render the statement material, regardless of its actual effect. *E.g. Salinas*, 923 F.2d at 341. Since the government has shown that Sears's testimony concerning

---

[5]To that end, Sears's contention that his defense counsel was ineffective in that he should not have elicited this false information from Sears is preposterous. Sears cannot seriously expect to perpetrate a fraud upon the court and then blame his trial counsel for asking the questions; the questions, after all, were not false—only Sears's answers were. There is absolutely nothing in the record to suggest that Sears's defense counsel knew that Sears was lying on the stand. Moreover, it is difficult to imagine how Sears can argue that his counsel was ineffective at the gambling trial given the fact that the trial resulted in his acquittal.

his military record could have influenced the trier of fact in its consideration of the merits, it has succeeded in establishing that the testimony was material for purposes of § 1623(a). *Cf. Allen*, 409 F. Supp. at 565 ("a statement is usually sufficient to support a charge of perjury if it is material to any proper matter of inquiry, or if it is intended or calculated to bolster the testimony of a witness on some material point, or support . . . the credibility of a witness").

Not surprisingly, Sears has not cited a single case holding that a witness's credibility is immaterial to the issues presented to the trier of fact. To the contrary, many of the cases cited by Sears actually support the government's position that a statement is material if it is capable of influencing the trier of fact on an issue legitimately before it. *See* Pet. Mem. (4/7/92) at 6 (citing, *e.g.*, *United States v. Girdner*, 773 F.2d 257 (10th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *United States v. Moore*, 613 F.2d 1029, 1038 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980)). Moreover, the two cases upon which Sears most heavily relies—in which courts ruled that certain factual misrepresentations were immaterial—are inapposite.[6] In both *United States v. Allen*, *supra*, 892 F.2d 66 (10th Cir. 1989), and *United States v.*

[6]A third case upon which Sears relies, *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991), is wholly inapposite and does not stand for the proposition asserted by Sears in his Memorandum of Law. In his memorandum, Sears states that the court in *Holley* "reversed defendant's conviction on a charge of perjury, on the grounds, *inter alia*, that the Government failed to adduce sufficient evidence of the materiality of the alleged perjury." Pet. Mem. (4/7/92) at 7. This statement is patently false. In fact, after thoroughly examining the issue, the court in *Holley* held that the government had clearly established the materiality of the defendant's statement and rejected the materiality argument out of hand. *Holley*, 942 F.2d at 923-25 ("[w]e hold that the materiality of the statement is established"). The court ultimately vacated the conviction and remanded for further proceedings, but on grounds unrelated to materiality.

The court assumes that counsel's blatant misrepresentation of *Holley* was mere coincidence.

Martinez, 855 F.2d 621 (9th Cir. 1988), the respective courts ruled that a criminal defendant who wrote a false name on a financial affidavit had not committed perjury when the affidavit was submitted for the sole purpose of determining whether the defendant was eligible to receive appointed counsel. Despite lying about their true identities, neither defendant was found to have committed perjury because their names did not affect their eligibility to receive appointed counsel. In other words, the courts in *Allen* and *Martinez* vacated the defendants' perjury convictions because the government failed to establish that the respective defendant's names were material to the issue of whether the defendant—regardless of his name—was indigent and thus qualified for assistance. *See Allen*, 892 F.2d at 67 ("the government failed to show that the determination of indigency would have been changed or otherwise affected by the use of the true name"); *Martinez*, 855 F.2d at 624-25 ("government utterly failed to show that the defendant's use of a [false] name . . . was material to a hearing devoted solely to determining financial eligibility for appointment of counsel").

Unlike the use of fabricated names in *Allen* and *Martinez*, Sears's fabrication of his military record could have affected the outcome of his 1989 trial and as such it constituted a material misrepresentation. As discussed above, the jury here was required to weigh the credibility of all of the witnesses in order to determine who was telling the truth. In this regard, Sears's testimony concerning his impressive military record certainly could have swayed the jury toward acquitting him. Accordingly, the court is compelled to find that Sears's statements concerning his military record were material to the determination of that case.

The net effect of the foregoing analysis is that Sears's have prevailed on a motion to dismiss the perjury indictment based upon the materiality argument. Therefore, especially in light of Sears's concession that his statements were false, there is not a "reasonable probability" that the outcome of the perjury case would have been different had defense counsel litigated the materiality issue. *Cf. Kimmelman*, 477 U.S. at 375; *Matos*, 905 F.2d at 32. Furthermore, after reviewing the case, counsel could have reasonably opined that Sears was best served by accepting responsibility for the perjury (rather than knowingly enter his client into a losing battle), thereby earning a downward departure in the sentencing guidelines and perhaps more favorable treatment from the sentencing judge. Even if another lawyer would have pursued a different, more effective tack, this court has no basis to conclude that counsel's performance was so egregious that he was not an effective counsel within the meaning of the Sixth Amendment. *Cf. Strickland*, 466 U.S. at 687-89. Accordingly, Sears's argument that he was denied effective assistance of counsel is without merit, and his petition for a writ of habeas corpus based upon that contention is denied with prejudice.

III. CONCLUSION

Petitioner has not convinced this court that he was denied effective assistance of counsel. Therefore, his application for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2255 is denied with prejudice.

IT IS SO ORDERED.

Dated: April 16, 1992
Syracuse, New York

HOWARD G. MUNSON
Senior United States District Judge
Northern District of New York

U.S. District Court N.D. of N.Y.
Filed
Apr 16, 1992
George A. Ray, Clerk
Syracuse

APPPENDIX B (Continued)—Amended Memorandum-Decision and Order of Hon. Howard G. Munson, U.S.D.J., N.D.N.Y., Dated April 17, 1992.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

WILLIAM J. SEARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Appearances:

Lysaght, Lysaght & Kramer, 1983 Marcus Avenue, Lake Success, NY 11042-1016, Of Counsel: Elliot I. Susser, Joseph L. Decolator.

Gary L. Sharpe, United States Attorney, Northern District of New York, P.O. Box 7198, 900 Federal Building, Syracuse, NY 13261-7198, Of Counsel: Andrew T. Baxter, Grant C. Jaquith.

HOWARD G. MUNSON, S.J.

Amended Memorandum-Decision and Order

This court's April 16, 1992 Memorandum-Decision and Order in the above-captioned case should be amended to reflect the following corrections:

1. Page 5, first paragraph, third sentence should read as follows:

   The burden is demanding because Sears cannot prevail merely by showing that his counsel employed poor strategy or even that his counsel made a wrong decision.

2. Page 5, last sentence (carries over to page 6) should read as follows:

   According to Sears, the indictment was defective because it lacked an indispensable element of perjury, *to wit* materiality.

3. Page 12, last sentence (carries over to page 13) should read as follows:

   The net effect of the foregoing analysis is that Sears's defense counsel in the underlying perjury proceeding would not have prevailed on a motion to dismiss the perjury indictment based upon the materiality argument.

IT IS SO ORDERED.
Dated: April 17, 1992
Syracuse, New York

HOWARD G. MUNSON
Senior United States District Judge
Northern District of New York

U.S. DISTRICT COURT
N.D. OF N.Y.
Filed
Apr 20 1992
AT 92-CV-448 OCLOCK ____ M
GEORGE A. RAY, CLERK
SYRACUSE

APPENDIX C—Letter Dated April 20, 1970, From Administrative Office of the United States Courts to Hon. John L. McClellan.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
Supreme Court Building
Washington, D.C. 20544

April 20, 1970

Honorable John L. McClellan
Chairman, Subcommittee on Criminal Laws
and Procedures
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senator McClellan:

This is in reply to your letter of April 17, 1970 asking for a report on the recommendations of the Judicial Conference of the United States with respect to S. 30, the "Organized Crime Control Act of 1969."

A study of this bill was instituted by the Conference's Committee on the Administration of the Criminal Law after receipt of a request of February 20, 1970, from the House Judiciary Committee for the views of the Conference thereon.

It might initially be noted that the Judicial Conference of the United States did not, at its recent meeting on March 16-17, 1970, make a new recommendation with respect to

Title I of S.30 which contains provisions relating to the procedures and functions of federal grand juries. The Conference had previously recommended disapproval of this title in the form in which it was worded when the bill was introduced on January 16, 1969 (Conf. Rept., Oct. 1969, p. 67) on recommendation of another of its committees, the Committee on the Operation of the Jury System. Subsequently, various amendments and changes were made in this title of the bill in the form in which it passed the Senate. The Conference has, however, not reconsidered nor made any further recommendations with respect to title I as it appears in the present version of S.30

Recommendations of the Conference agreed upon at its recent March 1970 session with respect to Titles II through XI are as follows:

Title II would make uniform a large number of immunity statutes. Its provisions are substantially identical to those contained in H.R. 11157, 91st Congress, which was approved by the Conference at the October 1969 session (Conf. Rept., p. 64). Upon recommendation of the Committee the Conference reaffirmed its approval of this proposal.

Title III would authorize the commitment of a recalcitrant witness who refuses to testify. The Conference approved the recommendation of the Committee disapproving this proposal as unnecessary in that the normal powers of the court are sufficient to deal with the recalcitrant witness who has been accorded immunity. This title would also prohibit the interstate flight by a witness who is to appear before a state investigating agency. It was the view of the Committee that this provision would place an excessive burden on Federal Law enforcement officials and would have a great potential

of abuse, unless it was restricted to the area of organized crime. Upon recommendation of the Committee, the Conference approved the proposal only to the extent that it applies to investigations of organized crime.

Title IV would provide criminal penalties for making false declarations in any proceeding before any court or grand jury of the United States. **It was the view of the Committee that the language of the bill would have greater clarity if the words "false statements of material fact" were substituted for "materially false delarations."** The Conference agreed with the suggestion of the Committee and approved this title of the bill with the suggested amendment.

Title V provides for special housing facilities for the protection of Government witnesses. The Conference voted to make no recommendation with respect to this proposal.

Title VI would provide for the taking of depositions in criminal cases. It was the view of the Conference that depositions fall within the rule-making function and should not be made the subject of legislation. Accordingly, the subject matter of this title was referred to the Advisory Committee on the Federal Rules of Criminal Procedure for its consideration.

Title VII, relating to litigation concerning sources of evidence, would, among other things, exclude objections to evidence of an event on grounds that such evidence was unlawfully obtained or given under compulsion and grant of immunity if the unlawful acts or the compulsion and immunity occurred more than five years before the event. The

Conference discussed the proposal, but voted to take no position with respect to it.

Title VIII would provide penalties for syndicated gambling. The Conference voted to take no position with respect to the provisions of this title.

Title IX would amend the Criminal Code to include a new chapter relating to racketeer-influenced and corrupt organizations. The Committee recommended that the various sections of the Chapter be approved except the proposed Section 1966 relating to the expedition of actions, and Section 1967 relating to evidence, the latter on the basis that it would require all depositions and other ancillary civil proceedings to be open to the public. This recommendation was approved by the Conference.

Title X would provide special sentencing procedures for habitual or dangerous offenders. After full discussion the Conference voted to approve the principle of special sentencing for dangerous offenders, but was of the view that provisions of this nature should be the subject of over-all legislation dealing with sentencing and should not be included in a special statute.

The Conference voted to make no recommendation on the proposed Section 3578 to establish a federal depository for conviction records.

Sincerely,

WILLIAM E. FOLEY
Acting Director

[Emphasis Supplied]